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CURRENT TOPICS

Sir William Malkin

THE loss at the age of sixty-two of Sir WILLIAM MALKIN, G.C.M.G., C.B., K.C., legal adviser to the Foreign Office, deprives the world of the services of one of those great international lawyers who have been instrumental in drawing the necessary documents embodying the great ambition of the peoples of the world for peace and security. His presumed death in the Liberator aeroplane which left Montreal for London on 3rd July (the search for which has now been abandoned) came at a time when he had just completed his part in the drafting at San Francisco of the new world constitution and the rules of the new International Court, and it is all the more tragic because he was about to enjoy some leisure which few men have better earned. After a first in the Classical Tripos at Cambridge, he was called to the Bar in 1907 and joined the Foreign Office in 1911. Sir William was at the peace conferences following the last war, and his tremendous experience and understanding of international legal issues was unstintingly at the service of his country during the present war. When so many questions of world security remain to be thrashed out in conference, his is truly a loss not only to the country which he served so faithfully, but to the world.

Juries

The Times, true to its great traditions of public service, published a special article in its issue of 19th July, headed "Trial by Jury: An Instrument of Plain and Popular Justice: Prompt Restoration Called For." The article contained general praise of the jury system such as is familiar to lawyers, and a plea for its speedy restoration in civil actions. Some of the arguments in favour of the jury system which *The Times* correspondent put forward are strong enough to be almost conclusive. Trial by jury, he pointed out, "has prevented the law from being over-subtle"; a judge must formulate propositions of law to juries in broad and simple terms. "It can hardly be doubted," he went on, "that but for the jury the common law would by now have been difficult of comprehension by any but highly trained minds." He instanced such questions as whether a reasonable person would have acted in a particular way, or whether a particular statement was defamatory, as peculiarly suited for jury trial. He also pointed out that the jury system had played a considerable part in giving the Englishman a respect for the laws of the country and for its judiciary. Furthermore, he rightly stated, the abolition of juries tends to blur the distinction between questions of law and fact and to cramp the law into an alien rigidity. He admitted the arguments that jury service was too severe a tax on the juryman (see on this, HUMPHREY, J.'s public expression of sympathy for and plea for repayment of loss to jurors resulting from jury service at Birmingham Assizes on the 20th July); but with regard to the argument that the jury system wasted time he retorted that by being relatively secure against appeal it actually saved time. Many lawyers will feel that this is a wise and timely article, but if the restrictions imposed by the Act of 1933, as well as the more recent emergency restrictions, are to be reconsidered, the powerful arguments that exist against any undue extension of the system, excellently marshalled in C. W. Muir's "Justice in a Depressed Area" (1936, pp. 113–121), and in Herbert L. Hart's "The Way to Justice" (1941, pp. 54–59), should not be ignored.

Broken Marriages

ALL thinking people will applaud and welcome the call made by the ARCHBISHOP OF CANTERBURY in his presidential address to the Canterbury Diocesan Conference on 16th July to take immediate practical steps to arrest the process of disintegration of family life which has been accelerated by the war. The great need of the day cannot be expressed more eloquently than in his own words: "In its supreme ordeal the nation called upon its members to leave home and family and all else. The nation must have on its conscience to help to the utmost those who return with their lives but whose domestic happiness is for one reason or another in jeopardy." Dr. FISHER referred with approval to the admirable but unco-ordinated work of the voluntary societies, the Marriage Guidance Council, the clinics, the Citizens' Advice Bureaux and the resettlement bureaux as well as the church organisations. Of particular interest to lawyers is his suggestion that in each locality experienced and sympathetic workers in all the bodies concerned should combine to form a co-ordinated policy, and in every civic area of any size there should be a centre or centres where married people can discuss their troubles and obtain expert advice confidentially—spiritual, medical, psychological, and legal. The Archbishop thought that the mayor of every borough should take the initiative in calling meetings with a view to establishing centres. Lawyers have special opportunities of understanding the nature and the vastness of the tragedy of broken homes, not only in the divorce and summary courts, but also in the criminal courts. If they are to avoid the reproach of being considered merely lawyers and a class apart from the rest of the public, they too should take some initiative, whether individually or collectively, in giving their contribution to what is undoubtedly the gravest problem of this generation.

Costs of House Purchase

AN old but good idea for the simplification of the buying and selling of houses was put forward by a special correspondent of the *News of the World* in a rather strongly worded article in the issue of that newspaper for the 22nd July. The keynote of the article was sounded in a sub-title: "Post-war Danger of High Legal Fees and Mortgage Redemption," and in the first sentence: "Why cannot a house be bought or sold just as simply as a new or second-hand motor car?" The answer to this ingenuous question would seem to be simply that a house is not a motor car. Owing to the number of interests and estates that can exist in land, as well as to the desire of some owners to tie up their property in complicated settlements, the purchase of a house under the best of conditions is far from being as simple as the purchase of a motor car. The writer, however, insisted that the sale of a house can be as simple as the sale of a motor car. "It will mean," he wrote, "compulsory registration of title to all property throughout the country and the introduction of a simple Government transfer certificate, to include, if desired, transfer of any mortgage on the property." He pointed out that in the areas where registration is at present compulsory on sale, the issue of a land certificate on acceptance of title by the Land Registry is "a State guarantee that the title is good against the world subject to such mortgages and other restrictions as may be set out in the register." The not always easy transition stage, however, from a mere possessory title to an absolute title was not mentioned by the correspondent, nor did he mention the fact, well known to lawyers, that unregistered dealings in registered land are far from unknown. There is little doubt, however, that compulsory registration ultimately tends to reduce legal costs, and from the public point of view this cannot be other than desirable.

Derequisitioning and Storage Charges

A RULING which may be of interest to solicitors advising their clients in derequisitioning cases was laid down by the General Claims Tribunal, on 13th June, on an agreed statement of facts (see *Estates Gazette*, 7th July, 1945, p. 10). The question was whether a claimant was entitled under s. 2 (1) (*d*) of the Compensation (Defence) Act, 1939, to recover from the requisitioning authority the cost of storing furniture, incurred subsequently to the date of derequisitioning. The requisitioning took place on 28th October, 1942, but on 16th September, 1943, a serious fire occurred on the premises, which comprised a considerable estate, and nearly all of the estate was derequisitioned two days later. The claimant duly removed and stored his furniture, but the authority only paid for storage for the two days between the date of the fire and the date of the derequisitioning. It was argued for the claimant that he had been directed to give vacant possession and that, as a result of that direction, he had to pay storage charges until he was able to find another house in the neighbourhood or rebuild his own. For the authority it was contended that storage charges incurred after derequisitioning were not recoverable because (1) the requisitioning and therefore the direction had come to an end, and (2) the expenses of storage after the derequisitioning flowed from the fire, because, but for the fire, the claimant could have moved his furniture back into the house. In reply, it was argued for the claimant, that if there had been no direction, and the fire had taken place, there would have been no goods to store, and therefore the cost of storage was an expense incurred by reason of the direction. The tribunal, however, held otherwise, and ordered the claimant to pay the authority's costs, to be taxed by the Chief Taxing Master of the Supreme Court.

Extended Requisitioning Powers

NOT all the learning on the statutes of forcible entry displayed by learned correspondents in the Press can dispel the popular conviction that despite the obvious illegality in seizing unoccupied residences, the action of the so-called "Vigilantes" was a genuine manifestation of the popular conscience on the housing shortage. The Ministry of Health circular of 20th July giving local authorities more extensive powers of requisitioning seems to be a direct and beneficial result of the publicity given to the illegalities resulting from "direct action" by homeless people and their sympathisers. The circular announces to local authorities that during the period up to 31st December local authorities can without first obtaining the approval of the Ministry of Health requisition empty houses, subject to posting notice of requisitioning for fourteen days on the premises in each case, and sending a similar notice by post to the owner or his agent if his name or address is known to the authority. If within the fourteen days' period the owner notifies the local authority of his intention to occupy the house himself, the local authority is to take no further action for the time being. The owner may within the fourteen days' period make different proposals for the occupation of his house, and such proposals will receive consideration. If action is suspended for any of these reasons the local authority is to ascertain within a reasonable period (three weeks is suggested) to ensure that the owner has carried out his intentions. If this has not been done the fact is to be reported to the senior regional officer of the Ministry of Health. In their own interests owners of unoccupied houses are advised to inform their local authorities of their names and addresses or those of their agents. The circular adds that nearly 90,000 houses have already been taken over and the number of unoccupied houses which are habitable or suitable without extensive work on them being done is comparatively small. There is some virtue in the word "comparatively," for the urgency of the housing situation is such that the public will not be satisfied until all unoccupied accommodation is in active use. The circular also announces that from 1st August authorities will be empowered to isuse licences for private housing work exceeding £100 in cost.

Recent Decisions

In *Fisher* v. *Ruislip-Northwood Urban District Council*, on 16th July (*The Times*, 17th July), the Court of Appeal (the MASTER OF THE ROLLS, MACKINNON, L.J., and UTHWATT, J.) held that a local authority was under an obligation to take reasonable steps to prevent an obstruction, such as a surface air-raid shelter, in their area from becoming a danger to the public. The plaintiff had driven his motor-car into the shelter owing to the fact that the external lights of the shelter were not burning at the time, and the shelter was therefore not visible to the plaintiff.

In a case before the Railway and Canal Commission (WROTTESLEY, J., Sir FRANCIS TAYLOR, K.C., and Sir FRANCIS DUNNELL) on 18th July (*The Times*, 19th July), the Commission allowed an appeal by the London and North Eastern Railway Company against a decision by the Railway Assessment Authority excluding from the valuation roll as part of the railway undertaking certain canteens operated for the benefit of their employees under contract with a catering firm. The Commission distinguished the case of *Westminster City Council* v. *Southern Railway Company* [1936] A.C. 511, on the ground that in that case there was a definite letting of specific premises and it was impossible to say in the present case that the caterers were in "paramount" control of the premises in question. The case was sent back to the Railway Assessment Authority with a direction to include the premises in the railway company's valuation roll.

In a case before the Railway and Canal Commission (WROTTESLEY, J., Sir FRANCIS TAYLOR, K.C., and Sir FRANCIS DUNNELL), on 19th July (*The Times*, 20th July), the Commission dismissed an appeal by the London and North Eastern Railway Company against a decision of the Railway Assessment Authority excluding from the railway valuation roll as part of the railway undertaking certain timber stacking yards at the railway company's docks at Hull. The yards were not used during the war owing to danger from possible enemy action, and the Commission held that as they "lay fallow" they had not that element of value which was the only element making it of any use including them in the roll.

COMPANY LAW AMENDMENT COMMITTEE'S REPORT

THE objects of the proposals contained in the Report of the Cohen Committee on Company Law Amendment are, in the committee's own words, "to ensure that as much information as is reasonably required shall be made available both to the shareholders and creditors of the companies concerned and to the general public." Attention has also been given to the question of increasing shareholders' control of the management of companies.

Press comments on the report have been uniformly commendatory, but it is necessary to correct the statement in the *Observer* of 22nd July that the principle of giving fuller information and publicity about company affairs and "that company affairs are the concern of the general public is a novel one in company law." It is as old at least as the introduction of the limited liability principle, and the 1908 and 1929 Acts considerably extended it in regard to prospectuses and balance sheets. The main recommendations in the order in which they appear are as follows:

Names of companies.—Section 17 (1) should be replaced by a section giving the Board of Trade discretion to refuse a name whenever they consider that the name is calculated to mislead the public.

Shares of no par value.—Their legalisation in this country would lead to abuses.

Prospectuses.—Section 34 should be amended by (*inter alia*) making it clear that the section applies to offers to existing members or debenture-holders.

Auditors' reports should be set out in the prospectus—

(1) with respect to profits or losses of the company in respect of each of the five financial years immediately preceding the issue of the prospectus, or the period since incorporation, if less than five years;

(2) in the case of a holding company a like report in lieu of (1) concerning the profits or losses of the company and its subsidiaries so far as attributable to the interests of the holding company;

(3) the rates of dividend paid in respect of each class of shares in respect of each of the five years or shorter period;

(4) with respect to the assets and liabilities;

(5) a report as to profits and losses for the same period of businesses to be purchased out of the proceeds of the issue.

Once the falsity of a statement in a prospectus has been established, the onus should be on a director to prove that he did not know that the statement was false, and could not, by taking reasonable precautions, have ascertained its falsity. (A proposal to that effect was made by the Director of Public Prosecutions in his evidence before the committee.)

An expert who allows the inclusion of his report, or a summary thereof, in a prospectus should be civilly liable, unless up to the date of the allotment he had reasonable ground for belief in its truth.

The committee state that it has been suggested that civil liability should attach to the bankers, brokers, solicitors and accountants whose names appear on the prospectus. They do not consider this justifiable, but add that "the public have the right to expect them (professional persons) to exercise the greatest discrimination before allowing their names to appear on any prospectus."

Private companies.—The exemption from the need of filing an audited balance sheet with the auditors' reports should be withdrawn from private companies in which other companies are beneficially interested.

Nominee shareholdings.—A transfer of shares should contain a declaration stating whether or not the transferee will be the beneficial owner of the shares. The report recommends provisions for securing that shareholders generally shall declare whether or not they are beneficial owners.

A person beneficially owning 1 per cent. or more of the issued capital or of the issued shares of any class should be obliged to declare to the company particulars of those shares and the names of the registered owners, except where the Board of Trade grants exemption in the national interest. A record of these beneficial owners should be kept by the company and should be open to public inspection.

Share transactions by directors.—Directors should be obliged to declare, at a meeting of directors, both direct and indirect interests in shares or debentures of the company or any subsidiary. Records of these interests must be kept and times set aside for opportunity of inspection by members or debenture-holders. Provisions for the payment of tax-free remuneration to directors should be void, and payments to directors of compensation for loss of office should be subject to the approval of the company in general meeting.

(*To be continued*)

CONTRACEPTION AND NULLITY

IN *Cowen* v. *Cowen*, the Court of Appeal, reversing a decision of Pilcher, J. (see p. 349 of this issue for reports of both decisions), gave on the 16th July a judgment of great sociological importance, holding that a wife who desired to bear a child while her husband insisted on using contraceptives or contraceptive methods to prevent it was entitled to a decree of nullity on the ground of the husband's wilful refusal to consummate the marriage.

The decision is of great, even far-reaching importance; but it will be the purpose of this essay to consider whether it justifies the expressions of surprise and apprehension which it has evoked, and to suggest that it not only is in accordance with common sense, but, so far as it goes, humanely affirms an important principle.

The relevant facts in *Cowen* v. *Cowen* were simply that, for some years, the couple agreed to prevent conception because, owing to the husband's work, they were living abroad in circumstances unfavourable to childbearing. Later the circumstances became favourable, and the wife wished to bear a child. The husband, however, insisted on continuing to prevent conception. The appliances which he used to that end having eventually become difficult to obtain in the Middle East owing to the war, he resorted to *coitus interruptus*, i.e., withdrawal before emission.

Before the Matrimonial Causes Act, 1937, came into force, wilful refusal by one of the partners to consummate the marriage was not a ground for granting a decree of nullity. Where, after a reasonable time, no marital intercourse has taken place and the wife has resisted all the husband's attempts, the court, if good faith is established, will infer that the wife's refusal arises from incapacity of a psychological nature. Where, on the other hand, the husband abstains from, or fails to attempt, intercourse with his wife, the inference of incapacity on his part is even stronger. If the husband has attempted intercourse but failed through inadequate virility, the court will find incapacity proved, and grant the wife a decree of nullity. Section 7 (1) (*a*) of the Act of 1937, however, created an additional ground for a decree of nullity, namely, wilful refusal by either spouse to consummate the marriage; and it was on that ground that the wife was held entitled to a decree in *Cowen* v. *Cowen*. In short, before the passing of the Act, wilful refusal *per se* was not a ground for granting a decree of nullity; the refusal had to be related to incapacity. It is interesting to read in Latey on Divorce (12th ed., at p. 188) the sentence, "wilful refusal being a question of fact, cases under this subsection have not called for report." With *Cowen* v. *Cowen* the subject may be said to have broken cover, and a set of facts which must be any-

thing but uncommon is found to be highly controversial and to give rise to a legal decision of first importance alike to lawyers and to laymen.

The difference of opinion between Pilcher, J., and the Court of Appeal is simply enough stated: the former held that complete penetration constituted consummation notwithstanding the interpolation of a sheath. The latter held that there could be no consummation without passage of spermatozoa into the female body; in other words, without transmission, as distinct from mere emission, of spermatozoa. Passage, or transmission, is the crucial fact; there is no act of procreation without it. Before Pilcher, J., counsel for the wife petitioner did not dispute that immediate steps, for example by douching, to prevent impregnation would not constitute non-consummation of the marriage.

It was consistent with the view which Pilcher, J., was taking that he should consider the use by the wife of an internal cap as also not preventing consummation. But neither he nor the Court of Appeal had before them the use of such a device. How the higher court would have dealt with that matter may be wondered. The test, they said, was passage from the male to the female body. The husband, by both the methods to which he resorted, prevented it. But to what part of the female body must there be passage? Transmission takes place where the wife uses a cap or other contraceptive within her own exclusive control; and it takes place, it may be thought, not the less because the subsequent progress of the spermatozoa within the female body is obstructed by the cap, or otherwise neutralised. What is the position if, fearing pregnancy, or for some other reason not desiring to bear a child, she for her part insists on using a cap during intercourse? Is the husband who desires children entitled in such a case to petition for nullity on the ground of the wife's wilful non-consummation of the marriage? Logically it should be so, and it may seem certain that the court would so hold. Yet the question must remain open since the Court of Appeal have apparently made mere transmission the test; transmission how far is not specified. Transmission, as such, or, to use the Court of Appeal's own phrase, passage from the male to the female body, undoubtedly takes place where the contraceptives used are those used by the woman.

The humane principle has been established in *Cowen* v. *Cowen* that a wife debarred from having a first child by her husband's refusal ever to permit the possibility of impregnation may obtain a decree of nullity under s. 7 (1) (*a*) of the Act of 1937, and so be free to have her child by another man. She has also been protected by that decision from the injustice which would be done to her were either intercourse with a sheath or *coitus interruptus* held to constitute consummation; for, were that the case, then, if she refused intercourse modified by those methods, her husband could obtain a decree of nullity on the ground that she had wilfully refused to consummate the marriage. It would be intolerable, indeed, if a husband could obtain a decree of nullity because his wife insisted on being allowed to bear his child. Are this principle and this protection from injustice, as should in logics and fairness surely be the case, equally applicable in favour of the husband whose wife insists on resorting to contraceptive methods within her own, as distinct from the husband's, control? It cannot, it must be repeated, be taken for granted that that question would be answered by the court in the affirmative, for that would involve assuming that the Court of Appeal, when it spoke of passage of the male seed into the female body, meant passage into the reproductive part of it. On the facts before it, namely, obstruction of the spermatozoa by the husband, the court did not need to be more precise than it was, hence the uncertainty now in question. Even if, however, the court did mean passage into the reproductive parts, the difficulty remains that some contraceptive methods open to a woman do not in fact entirely or at all impede that passage into those parts.

As to the benefit which s. 7 (1) (*a*) actually confers, as at least one astute practitioner has already pointed out, the subsection has largely failed to achieve what was presumably its object. Commenting on *Cowen* v. *Cowen*, our contemporary, the *New Statesman and Nation*, states in its issue of 21st July: "It establishes that a woman is assumed under a marriage contract to have a legal right to bear one child, and to terminate the contract if her husband, being sexually potent, denies it to her." Our contemporary is wrong. It has accurately expressed what presumably was the object of the subsection, but that object is not achieved for this reason: If the husband grants his wife one occasion of full intercourse without the use of contraceptives or contraceptive methods, he has clearly consummated the marriage; but if no child is conceived as a result of that occasion, the wife has no remedy if her husband refuses further intercourse without contraceptives. The marriage having been consummated once and for all on that one occasion, the wife's remedy under the subsection has gone, and she is powerless against his subsequent refusals. What in fact the subsection gives to a wife is not a legal right to bear one child, as our contemporary says, but merely a legal right to one chance of bearing one—a very different proposition, and a very unsatisfactory state of affairs it may be thought.

Apart from these questions, however, it seems doubtful whether the Court of Appeal's decision has all the dark implications which some appear to have read into it. Admittedly, Pilcher, J.'s reasoning based on complete penetration seems firmly founded in common sense. For a question of nullity to arise at all between spouses after years of marital intercourse which, notwithstanding the use of contraceptives, would be pronounced by any doctor or psychiatrist to have constituted a happy love-life between them may seem absurd at first sight. The husband's refusal to let his wife have a child seems much more naturally to form the foundation for a charge of cruelty. Even the Court of Appeal speaks of procreation only as "one of the chief ends of marriage," thus impliedly conceding that there are others. A great love and a harmonious relationship enriching and in turn cemented by marital intercourse are no mean achievement, and a great blessing of far-reaching benefit also to spouses who remain childless. It seems strange indeed that it should be possible for such a happy state, attained while the parties were in agreement about not having children, to be followed, once they had come to disagree on that subject, by a plea that the marriage had never been consummated. It may well sound to some like juggling with words. Visions have been conjured up by the Court of Appeal's judgment of a wife's turning round after years of a happy love-life with her husband and contending that the marriage has never been consummated because the parties had practised birth control. The answer to any such apprehension appears clearly in the latter part of the court's judgment, where they state that if a wife has never made any objection to her husband's use of contraceptives she will certainly not be entitled to a decree of nullity; and they make the matter still clearer by going on to say that, when she has consented over a long period to the use of contraceptives before asking her husband for normal intercourse with a view to pregnancy, the court will require her to adduce some excuse or justification for her earlier consent. The court's decision does not seem, therefore, to throw open any doors to capricious behaviour on the part of a wife.

It may be asked, again, if the decision is consistent with the fact that a spouse cannot obtain a divorce on the ground of the partner's sterility or barrenness. It is consistent with it, for the reasons already discussed: in cases of sterility or barrenness there is unimpeded transmission of the spermatozoa; non-conception is due to a natural physical disability, not to an artificial barrier; the marriage has been consummated, but the spermatozoa have remained ineffective; the couple have done all they can, and neither is to be penalised for a physical defect of which neither knew before the marriage, and for which, it may be, neither is to blame.

The words "wilful refusal" in s. 7 (1) (*a*) of the Act of 1937 are not defined, and have now been construed by the Court of Appeal as including a husband's insistence on preventing any chance of pregnancy. In certain circumstances, might this

decision not result in great hardship to a wife, and in the husband's being in effect able to circumvent the rule that a husband cannot get rid of his marriage on account of the wife's inability to bear a child? For it not infrequently happens that a young wife's medical advisers tell her that for some reason connected with her health she must, under pain of dire consequences to herself, refrain from allowing herself to become pregnant. That means that she is obliged, if her doctor's warning is to be heeded, to have marital intercourse accompanied by the use of a contraceptive. Is the husband who wants children free, in the bitterness of his disappointment, to plead that his wife, if she decides to obey her doctor's injunction, is wilfully refusing to consummate the marriage? Refusal there would certainly be. Would it be a "wilful refusal" within the meaning of the Act? If the court believed, in such a case, that the wife really desired to have a child, and that her only reason for preventing pregnancy was the grave warning of her doctor, it would probably not hold that refusal, which circumstances forced her to "will," to be a "wilful refusal" within the meaning of the subsection. But what if the consequences against which the doctor warns are serious yet not of the gravest kind? At what point in a diminishing scale of danger can the wife be called on to take the risk? At what point, that is, will the court hold the refusal to be wilful? No doubt there is no precisely definable point, and every such case when it arises will have to be considered on its own facts. The point remains none the less highly problematical.

It seems, then, that we have here one of those decisions which, while not really breaking new ground, or raising disquieting implications, yet sheds a new and bright light on an old topic, and throws into perspective new issues which may come up for decision at any time. When, in years to come, the whole of our divorce law has been reformed and rationalised, *Cowen* v. *Cowen* may appear to have been merely a natural step in that process.

A CONVEYANCER'S DIARY

THE ACQUISITION OF LAND (OWNER-OCCUPIER) REGULATIONS, 1945

THE Lord Chancellor has made certain regulations, known as the Acquisition of Land (Owner-occupier) Regulations, 1945 (S.R. & O., No. 759/L.12), which are of importance to all solicitors who deal with questions of real property. These regulations are anything but self-explanatory, and I trust that the account which follows is reasonably accurate.

Section 58 (1) of the Town and Country Planning Act, 1944, provides that where a person entitled to compensation in respect of a compulsory purchase is an "owner-occupier," he is to be entitled to a supplement to the usual compensation. This provision was, I believe, one of those which were hastily introduced into the Bill at the time of the Parliamentary controversy last autumn about the measure of compensation. The idea appears to be that a person who is turned out of his own house ought not only to have the value of the house (assessed, one presumes, on the none-too-generous basis normal in these cases), but also a supplementary payment, up to some 30 per cent. of the amount of compensation, to recompense him for physical dispossession.

Under s. 58 (5) an "owner-occupier" for these purposes is defined as being (*a*) a person in actual occupation of the property at the date of the notice to treat; or (*b*) in the case of property unfit for occupation through war damage, a person in actual occupation when the war damage occurred; or (*c*) in the case of requisitioned property, a person in actual occupation just before possession was taken by the requisitioning authority; or (*d*) a person who at the time of the notice to treat (i) has a present right to occupy or who will have such a right within five years *and* who (ii) in either case intends so to enter (subject to any postponement necessary through repairs to make good war damage).

None of these categories precisely fits into the case of land held on trust. Thus a tenant for life of land or a tenant for life of proceeds of sale of land, either of whom is in actual occupation of the land, ought to qualify for a supplement just as much as an occupier who has the fee simple as beneficial owner; but they are both outside s. 58 (5). Accordingly s. 58 (6) (*a*) confers power on the Lord Chancellor to make regulations adapting s. 58 (5) to cases where the person entitled to compensation "holds as trustee or otherwise for the benefit of another or subject to the directions of another." The regulations are made in exercise of this power. In passing, I should like to say that this is an instance in which the power of subordinate legislation is not open to any objection; the section is itself ameliorative, and the Lord Chancellor is empowered to extend its scope. It thus compares favourably with the usual sort of delegated power to tighten the noose round the citizen. The regulations actually made seem, moreover, to be generously conceived; we thus have the pleasant and unusual duty of congratulating a Government department.

For the purpose of adaptation, land held by one person on trust for, or for the benefit of, or subject to the directions of, another, is divided into four classes: (i) settled land; (ii) land held on trust for sale; (iii) land vested in a personal representative; (iv) any other such land. The adaptation is worked by means of a schedule consisting of a table in four columns. The first column sets out those four categories. In the second column opposite the reference to each category are mentioned the persons whose actual occupation is to count, for that class, as occupation by an owner. Thus in the case of settled land (column 1) actual occupation by any of the persons mentioned in column 2 will be good enough to attract the supplement, viz., "any beneficiary under the settlement occupying pursuant to the trusts or powers of the settlement"; in the ordinary case the qualifying occupant will be an ordinary tenant for life, but it would be sufficient if, for instance, the occupier were one of a class of beneficiaries, objects of a discretionary trust, let into possession by the statutory owners. In the case of land held on trust for sale, the class in column 2 is "any beneficiary under the trusts subject to which the land is held occupying by virtue of a permission granted pursuant to the trusts or powers of the trust." This formula covers the ordinary case of an equitable tenant for life of proceeds of sale who is let into possession under the general law as well as cases where there is an express power to let the person into possession. Such a case may arise where trustees for sale are given express power to buy a house and to let A live in it. Where the land is vested in a personal representative, occupation by the testator or intestate (previously, just before his death) is enough, as is also that of a person who could be let in under the powers of the will if the administration were finished.

So much for the cases of occupation at the date of the notice to treat. The same tests are to be applied in those cases where the material date is that of war damage or of requisitioning. The cases designated as class (*d*) above are dealt with by columns 3 and 4 of the Schedule. The definition of this class consists of two sets of requirements, numbered (i) and (ii), joined by the word "and." Thus a beneficial owner would qualify under (*d*) if he (i) has the *right* to occupy, and also (ii) has the *intention* to occupy as soon as the war damage is put right. Where these tests have to be applied to persons concerned with land held on trust there is the difficulty that the only persons with a legal RIGHT to occupy might easily be the trustees themselves, and they will seldom have any *intention* to occupy. The scheme of columns 3 and 4 is, therefore, that if a beneficiary can show an *intention* to occupy (column 4) provided he is allowed to do so by the person having the *right* to occupy (column 3) the supplement is payable. Thus, in the case of land held on trust for sale one would have to show that the trustees for sale have the

right to occupy and that the equitable tenant for life has the intention to do so provided he can get himself let into possession.

Such is the main outline. The table is very complex in its wording, due, evidently, to a desire not to omit from the benefit of the regulations any class of persons by reason only that their title is not quite simple and straightforward. Thus there are provisions about " ecclesiastical property " in conjunction with those about settled land, because there are some cases where property belonging to the Church of England fails to fall within the extended concept of settled land as expressed in s. 29 of the Settled Land Act, 1925. Again, the draftsman has not forgotten, in dealing with land vested in personal representatives, that there are cases where the legal estate is vested in the probate judge pending a grant of administration. So far as I can see, the only case in which land held by trustees or quasi-trustees is excluded is that of land vested in a trustee in bankruptcy ; this exclusion seems correct.

To apply the Schedule, then, one must first see in which of the four classes the legal estate falls. Then, one must see who is in actual occupation, or who would be occupier but for war damage or requisitioning, or whether there is anyone concerned with the trust who can become entitled to possession within five years. Having found that, one must see whether that person fits the second or the fourth column of the Schedule. The scheme is very ingenious and is in fact easy enough to work in a concrete case. Thus, let us suppose that an almshouse is taken under the Act ; the occupant is an old lady entitled to occupation as a selected person qualified as a beneficiary of the charity. The land is settled land, because the almshouse is vested in charitable trustees, and land so vested is deemed to be settled land within S.L.A., s. 117 (1) (xxiv) and s. 29, which are incorporated in the regulations by art. 2 (1) (*a*). So far as column 1 of the Schedule is concerned, therefore, this land is within the first class of land held on trusts. The case also falls within the entry in column 2 opposite " settled land " ; for the relevant entry is " in the case of land held on or for charitable . . . trusts or purposes any person occupying . . . for those purposes." The old lady's occupation is for the purposes of the trust of almshouses.

Curiously enough, however, the person actually or constructively ejected does not get the supplementary payment as a solatium ; neither the regulations nor the section under which they are made affect the destination of the compensation ; all that is provided is that in such and such cases the compensation shall be increased to a prescribed extent. This curious arrangement is, of course, no fault of the draftsman of the regulations, but follows from the absence of any provision in the section. The position is, however, very illogical ; the supplement is really compensation for disturbance and should go to the person disturbed. Legally, however, it is, without doubt, an accretion to capital money or proceeds of sale, and the trustees would have to treat it as such. This matter seems to require the attention of the new Parliament.

LANDLORD AND TENANT NOTEBOOK

CHANGES AFFECTING CONTROLLED PROPERTY

THE true meaning of the maxim *Vigilantibus non dormientibus jura subveniunt* may or may not have been misapprehended by members of certain organisations active at Brighton and elsewhere, but there can be no doubt that it contains sound advice to parties to controlled tenancies. And this for two reasons : one is that a landlord's prospects of obtaining an order for possession may depend on events occurring not only after the expiration of the contractual tenancy, but even on events happening after the issue of a summons ; the other, that the status of the property itself may vary by reason of changes over which he has no control.

Attention has several times been forcefully drawn to the method adopted by the Increase of Rent, etc., Restrictions Acts in providing security of tenure. " No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply . . . unless the court considers it reasonable to make such an order or give such a judgment, and either (*a*) the court has power so to do under the provisions set out in the First Schedule to this Act ; or (*b*) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect " are the relevant words of s. 3 of the Rent, etc., Restrictions (Amendment) Act, 1933. This means, as Bankes, L.J., put it in *Barton* v. *Fincham* [1921] 2 K.B. 291 (C.A.) (dealing with the substantially similar s. 5 of the 1920 Act), that the Legislature in reference to claims for possession has secured its object by placing the fetter not upon the landlord's action, but upon the action of the court.

And, while many of the " provisions set out in the First Schedule " use the perfect tense—rent has not been paid, the tenant has been guilty of conduct which is a nuisance, the condition of the dwelling-house has deteriorated, etc.—those concerned with cases in which the landlord wants the house for his own or an employee's use are in the present tense : the dwelling-house *is* reasonably required, etc.—also, that which entitles the court to act on the ground of availability or alternative accommodation uses present and future ; while the overriding condition of reasonableness is in the present—the court *considers* it reasonable to make such an order or give such a judgment.

An early instance of the significance of this was afforded by *Harcourt* v. *Lowe* (1919), 35 T.L.R. 255. The plaintiff in that case issued a writ claiming possession of a protected agricultural cottage in May, 1918 (having given notice to quit in February), in order to provide accommodation for a ploughman employed by one of his tenants who had been served with an order to plough. By the time the case came on for hearing, which was on the 11th February, 1919, the order to plough had apparently been withdrawn. " The only time which it is necessary to consider . . . is the time when the court is asked to make the order. It is quite immaterial to consider the time when notice to quit was given," said Lush, J. It is true that the plaintiff succeeded on a different ground, but the authority was applied in *Artizans, Labourers and General Dwellings Co.* v. *Whitaker* [1919] 2 K.B. 301, and both were followed in *Kimpson* v. *Markham* [1921] 2 K.B. 157, an alternative accommodation case ; it was shown that such had been available when notice to quit was given, but if still available when the notice expired and when the summons was issued it had gone when the case was heard, and a Divisional Court set aside the order for possession made by the county court. It may be remembered that the " or will be available when the order takes effect " was introduced by the 1933 Act, but Parliament has refused to include pre-hearing availability among the grounds for possession. *Nevile* v. *Hardy* [1921] 1 Ch. 404 was to the same effect, and also illustrates the importance of proving that it *is* reasonable, at the date of the hearing, to make the order.

The vigilance called for in the matter of change of status is perhaps not so great, for the authorities show that in these cases the date of action brought is what matters. I think the first inkling of the possibilities was given by *Glossop* v. *Ashley* [1922] 1 K.B. 1 (C.A.), but *Prout* v. *Hunter* [1924] 2 K.B. 736 (C.A.) was the first illustration. In that case the tenant of a flat within the Acts sub-let it furnished and the landlord gave her notice to quit. The furnished sub-letting continued when the notice expired and when the summons was issued and the action heard, and the plaintiff was held to be entitled to an order. Though Bankes, L.J., asked, in the course of his judgment : " But at what time is its status of a furnished house to be considered ? " the answer, from the point of view of future guidance, was not as precise as might be desired : " It would seem that the material time is when the landlord seeks to obtain possession " and did not specify

(as there was no need for any particularisation in the circumstances) whether this would be when notice was given, when it expired, or when process was issued, or when the claim was heard. But in *Gidden* v. *Mills* [1925] 2 K.B. 713, when a tenant had converted a warehouse into a garage with living rooms above and had sub-let the latter (unfurnished) and the landlord was held to be entitled to possession of the garage, Greer, J., said: "the court must look at the status of the premises at the time the action for possession is brought." Then *Leslie & Co.* v. *Cumming* [1926] 2 K.B. 417 gave us some further indications: the defendant, statutory tenant of a flat, after twice sub-letting it furnished, let two rooms furnished in May, 1925. On the 2nd November a plaint was issued claiming possession of the whole. The sub-tenant left before the action was heard. It was held that the previous sub-lettings could give no cause of action, and the action failed; the judgments imply that if possession had been claimed of the two rooms only, an order could have been made; but most helpful was MacKinnon, J.'s "the fact that a house has been let furnished for a period which has expired *before proceedings are commenced* cannot be relied upon as taking the house out of the protection of the Act." To the same effect is *Ebner* v. *Lascelles* [1928] 2 K.B. 486, when the point arose in a peculiar way, the action being one for dilapidations. The lease under which it was brought contained an unqualified repairing covenant, but had followed two leases exempting the tenant from liability as regards fair wear and tear. She had never occupied the premises, but had sub-let part of them furnished, part of them unfurnished; when the last lease terminated, however, all sub-tenancies had come to an end. The contention that the increased duty to repair was unenforceable was upheld. The most recent instance, *Mann* v. *Merrill* [1945] W.N. 106; 89 SOL. J. 328, was discussed in our issue of 26th May (89 SOL. J. 244).

TO-DAY AND YESTERDAY

July 23.—On the 23rd July, 1839, Sir William Horne accepted the post of Master in Chancery. It was a strange anti-climax, for he had been Attorney-General and certainly he suffered both ill-luck and ill-usage. The Solicitor-General with him was Sir John Campbell, who, ever constant in self-advancement, assiduously pulled strings which eventually resulted in the resignation of Mr. Baron Bayley, so that the vacancy in the Court of Exchequer might enable the authorities to shelve Horne with a judicial appointment and secure his retirement from the office of Attorney-General. Horne, who was really a Chancery practitioner, indicated that he was willing to accept, provided it could be arranged that he would be exempted from going circuit and could concentrate on the Exchequer's equity jurisdiction. The Lord Chancellor, Brougham, held out some hope that this might be possible, but when it proved impracticable told Horne that he must take the place without conditions. Horne insisted that his acceptance had only been conditional, and this seems to have been the case, but Brougham made out that he had finally resigned the Attorney-Generalship and that Campbell was to have it. The victim of this piece of political sharp practice behaved with dignity and honour and resumed his work as a Chancery leader. By 1839 competition began to press him hard and he became a Master in Chancery. The task of working out the decrees of judges much junior to himself so irritated him that the oaths and exclamations that he interjected during the proceedings made curious reading in the shorthand writer's note which sometimes could not be read in open court.

July 24.—In 1798 Mr. Oliver Bond, an eminent woollen draper, was tried in Dublin on a charge of treason, being accused of complicity in the great rebellion of that year. The chief witness for the prosecution was a silk mercer, named Reynolds, who had long passed as a United Irishman, but now appeared as a well-rewarded informer. In a court packed with soldiers, the great Curran heroically defended the accused, attacking the credit of Reynolds with pitiless sarcasm. Bond, however, was convicted on the 24th July. He eventually died in prison, some said by apoplexy, some said by murder.

July 25.—Philip Stoffel had an aged great aunt, who lived in modest comfort in rural Clapham. One evening on the pretext of delivering a parcel he and some friends got into the house and robbed her. She was afterwards found dead with an apron stuffed into her mouth. On the 25th July, 1823, Stoffel and a fellow named Keppel, were tried for murder at the Croydon Assizes. When the judge, Mr. Serjeant Onslow, pronounced sentence of death, Keppel became violently abusive and had to be removed forcibly from the dock.

July 26.—On the 26th July, 1693, William Jones and John Barber, both young men in the middle twenties, who had worked in partnership as highwaymen, were hanged at Tyburn for a robbery. Jones who had inherited a small estate, took to the road after killing a man in a quarrel. Barber, after working as a gentleman's servant, took to gaming and crime. On the scaffold they both abused the chaplain, but Jones said at the end: "Well, it's a dismal thing, for all our jesting, to be hanged up by the neck!"

July 27.—On the 24th July, 1804, the action for criminal conversation brought by the Rev. Charles Massy against the Marquis of Headfort, was tried at the Ennis Assizes. Eight years earlier the plaintiff, a well-connected young clergyman enjoying a large income from church livings, had married a beautiful girl of eighteen. They made the acquaintance of the defendant, a wealthy nobleman of fifty, when his regiment, the Meath Militia, were quartered at Limerick. With him Mrs. Massy eloped one Sunday morning while her husband was conducting divine service. Curran's speech for the plaintiff in the fashion of the day reads like one by Serjeant Buzfuz. It won a verdict of £10,000 damages.

July 28.—On the 28th July, 1936, Mr. I. H. Stranger, K.C., Recorder of Sunderland, died suddenly of heart failure in his private room during an adjournment. The previous day he had been unwell and the doctor had advised him not to sit, but he had determined to finish the hearing of an appeal.

July 29.—On the 29th July, 1747, "Cook and Ashcraft, two smugglers, were conveyed from Newgate under a guard of soldiers to Tyburn, there executed and afterwards hung in chains at Shepherd's Bush."

ONE VOTE ONLY

Among several letters to a Sunday newspaper discussing narrow majorities and other similar curiosities in Parliamentary elections, one of them stated that Sir Hardinge Giffard, afterwards Lord Halsbury, when he stood for Launceston, secured only one vote. That is inaccurate. In February, 1877, he was returned for Launceston. The occurrence referred to took place at Horsham in 1875 and is thus related by his biographer: "The central Conservative office believed erroneously that the sitting Member was retiring and offered Giffard the seat. He had issued his election address and begun his canvass before the mistake was discovered. He at once withdrew exhorting the electors to vote for their old Member. On the polling day, however, one vote was recorded for Giffard, who used afterwards jokingly to express astonishment at the number of people who wrote to him, claiming to have registered that particular vote." In the previous year he had suffered his second defeat at Cardiff, this time by the narrow margin of nine votes. His campaign there was marked by two curious incidents. A man who described himself as a Scot demanded to see him privately and on being admitted said: "There is no use beating about the bush. I have got a vote and I will give it you if you will lend me £20." The other incident was hostile. He went to a baker's shop to canvass and was received by the baker's wife roaring: "Get out of my shop or you'll get your head in a sack of flour." In November, 1875,

Giffard had become Solicitor-General and by September, 1876, the apparent hopelessness of the prospect of his getting into Parliament was such that the Lord Chancellor offered him a puisne judgeship, but he took the risk of refusing it, and Launceston soon after received him.

NARROW MAJORITIES

To judge from other letters published in the newspaper, lawyers seem to have specialised in narrow majorities. Apparently John Addison, Q.C., was elected for Ashton-under-Lyne in 1886 by the Mayor's casting vote. William Willis, Q.C., was returned for Colchester in 1880 by a majority of one and H. E. Duke, K.C. (afterwards Lord Merrivale), won Exeter in 1910 by the like margin. In the 1910 election, too, Henry Terrell, K.C., who subsequently became a county court judge and who died last year, was elected for Gloucester by the relatively substantial majority of four. Addison and Willis like Terrell both ceased to woo the precarious favour of the electorate and eventually came to rest on the county court bench. Willis, who had been a Liberal in politics, there distinguished himself by a marked preference for the man as against the master and the employee as against the employer.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL*]*

Divorce Law

Sir,—When the old rules were altered and it became possible for a wife to divorce her husband on the grounds of adultery alone it was considered that the step was one favourable to the interests of wives and brought them up to the equality of rights with husbands.

In a recent matter a client who was a wife, being pressed by her husband to take proceedings to dissolve the marriage on the grounds of his misconduct (of which he had supplied her with ample legal evidence), made a very pronounced criticism of the law.

What this lady said was that it put a premium on misconduct between married men and single women.

In earlier days if a girl was willing to commit misconduct with a married man she did it with her eyes open to the fact that marriage to him was impossible and therefore she would be inclined to think twice before taking such a step. To-day it is common knowledge that the very misconduct itself can be used as a lever to get the husband's freedom and a subsequent marriage will give the other woman a husband and a legal father to any children born to the marriage.

It will be interesting to know whether this lady's opinion is confirmed in the experience of other solicitors who do any divorce practice.

Bournemouth. J. KNIGHT.
14th July.

American Lawyers in Solicitors' Offices

Sir,—Mr. R. C. FitzGerald writes in your issue of the 14th July expressing the view that it is undesirable from the point of view of clients that solicitors should give facilities for American lawyers serving with the forces to gain experience in their offices of British law, practice and procedure, and suggests that a distinction should be drawn between the professions on the one hand and business, trades and industries on the other participating in the scheme, because the professions deal with the private affairs of others.

Is it to the advantage of the medical profession that American doctors should gain experience and give the benefit of their own in British hospitals, and do the patients really mind? Are not American lawyers equally as conscious as British lawyers of the professional duty of guarding the secrets of clients, and are not the promotion of good relations between lawyers generally and the better understanding of and experience in our respective laws, practice and procedure for the benefit of the public generally and, therefore, of all our clients?

Solicitors who invite American lawyers to gain experience in their offices will be helping their American colleagues and—dare one suggest it—might even themselves at the same time receive some benefit from the experience of their guests in such matters as office organisation and routine.

T. G. LUND,
Secretary,
London. The Law Society.
19th July.

OBITUARY

MR. R. EPTON

Mr. Robert Epton, solicitor, of Messrs. Danby, Eptons and Griffith, solicitors, of Lincoln, died recently, aged seventy-one. He was admitted in 1895.

MR. W. MARSHALL

Mr. William Marshall, solicitor, of Messrs. Marshall, Son & Fisk, solicitors, of Ipswich, died on Thursday, 12th July, aged eighty-nine. He was admitted in 1890.

MR. J. A. W. ROGERS

Mr. James Arthur Warrington Rogers, solicitor, of Victoria Street, S.W.1, died on Saturday, 7th July, aged sixty-nine. He was admitted in 1902.

MR. J. W. W. WEIGALL

Mr. Julian William Wellesley Weigall, Recorder of Gravesend since 1922, died on Tuesday, 10th July, aged seventy-six. He was called by the Inner Temple in 1894.

MR. E. WHITE

Mr. Edward White, solicitor, of Messrs. Burton & Co., solicitors, of Lincoln, died recently, aged eighty. He was admitted in 1888.

WAR LEGISLATION

STATUTORY RULES AND ORDERS, 1945

No. 846/S.31. **Acquisition of Land.** (Valuation for Supplemental Compensation) (Scotland) Regulations. July 11.
No. 835. **Alien Restriction.** The Aliens (Release from H.M. Forces) Order. July 9.
E.P. 843/S.1. **Police, Scotland.** (Employment and Offences) Order, June 13.
E.P. 839. **Regulated Areas** Revocation Order, July 9.
E.P. 848. **Royal Observer Corps** (Employment) (Revocation) Order, June 29.

COMMAND PAPERS

6659. Committee on Company Law Amendment. (Chairman: Cohen, J.) Report. June 11, 1945.

LORD CHANCELLOR'S DEPARTMENT

Limitation (Enemies and War Prisoners) Act, 1945. List of dates on which territories became, or ceased to be "Enemy Territories" as defined by s. 2 of the Act.

TREASURY

Defence Regulations, as amended up to and including May 9, 1945. 16th Edition. (Vols. I and II combined.)

[Any of the above may be obtained from the Publishing Department, S.L.S.S., Ltd., 88/90, Chancery Lane, London, W.C.2]

HONOURS AND APPOINTMENTS

Judge Rooper Reeve, K.C., retired from the County Court Bench on Monday last. The Lord Chancellor has appointed Judge LANGMAN to succeed him on Circuit 22 (Worcester, etc.) and has appointed Mr. RALPH SAMUEL SHOVE to succeed Judge Langman on Circuit 17 (Lincolnshire). Mr. Shove was called by the Inner Temple in 1918.

Mr. JOHN FRANCIS BOURKE has been appointed Recorder of Shrewsbury in succession to the late Mr. Kenelm Preedy; Mr. NORMAN ALEXANDER CARR has been appointed Recorder of Windsor in succession to Judge Murray Sturgess, who has resigned; and Mr. NORMAN ROY FOX-ANDREWS, K.C., of the Western Circuit, has been appointed Recorder of Bournemouth in succession to Mr. Herbert David Samuels, K.C., recently appointed Referee of the High Court.

Sir JOSHUA SCHOLEFIELD, K.C., has been reappointed Chairman of the Railway Assessment Authority.

Major R. H. MIDDLETON, R.A., a member of the firm of Middleton & Co., solicitors, Sunderland, has been awarded the M.B.E., Military Division. He was admitted in 1930.

Professional Announcement

FRESHFIELDS, LEESE & MUNNS announce that on the 4th August they will be moving to fresh offices at No. 1, Bank Buildings, Princes Street, E.C.2. Their new telephone number will be Monarch 9421/6. On the same date they will revert to the firm-name of "Freshfields," under which name the business of the firm was for many years carried on.

NOTES OF CASES

KING'S BENCH DIVISION AND COURT OF APPEAL

Cowen *v.* Cowen

Pilcher, J. 24th April, 1945

Scott, du Parcq and Morton, L.JJ. 16th July, 1945

Divorce—Nullity—"Wilful refusal" to consummate—Husband's insistence on use of contraceptives—Matrimonial Causes Act, 1937 (3 & 4 *Geo.* 6, *c.* 35), *s.* 7 (1) (*a*).

Undefended petition for divorce.

The parties were married in 1932. Before the marriage they agreed that as they would be living in the Middle East, where the husband was employed, they would take steps to avoid conception of a child, as the conditions there were not suitable for childbearing by European women. For the first five years of the marriage the husband invariably used a contraceptive sheath during intercourse with his wife. After 1937 circumstances were favourable for the wife to bear a child in the Middle East, and she pressed the husband for what she called a normal married life. The husband refused. The outbreak of war made it difficult to obtain contraceptives in the Middle East, and the husband practised *coitus interruptus*, or withdrawal before emission; but intercourse in that way was rare between them, and they became estranged principally owing to their disagreement on the question of children. The wife accordingly brought this petition.

PILCHER, J., said that throughout the married life there had been intercourse—using the word in a non-technical sense—between husband and wife with the use of a sheath. The intercourse was complete in the sense that there was complete penetration; and only incomplete in the sense, if that could be called incomplete, that, inasmuch as a sheath was always used, there was no possibility of pregnancy resulting, provided that there was no accident to the appliance employed. Counsel had pointed out that there was no actual contact between the male and female members, it being the design of the particular form of contraceptive used to prevent that. On those facts counsel had advanced a novel argument, which could not have been advanced before the passing of the Act of 1937, which for the first time rendered it possible for one or other spouse to obtain a decree of nullity on the ground of wilful refusal to consummate the marriage. Basing himself on ecclesiastical doctrines, counsel argued that no marriage could be consummated where there never had been any opportunity for the procreation of children, and where one party had, as in this case, throughout wilfully refused to allow such conditions to obtain as would permit of the procreation of children. He pointed out that the husband's insistence on having intercourse—again using the word in a non-technical sense—was designed simply for the satisfaction of his own physical desire, and that, inasmuch as there never was any physical contact between the organs of the parties, the two never were one flesh. That argument had some attractions, but he (his lordship) thought it unsound. The question of fact in every nullity case was simply whether or not the marriage had been consummated; and the party who wished to establish that the marriage had been consummated had always had to show that there had been some effective penetration of the female organ by the male organ. Complete penetration established consummation, and that quite irrespective of whether an appliance like a sheath had been used, which would effectively prevent one of the purposes for which marriage was ordained, namely, the procreation of children. Counsel did not commit himself as to the position which might arise if the woman herself were to wear an appliance such as a cap, which might be quite as effective for the avoidance of conception as a sheath; but he did agree that his argument would not be open to him if the practice of douching were followed, because the act of intercourse would then have been complete; semen would have been emitted into the wife's body, and its removal by a douche could not affect the question whether the marriage had been consummated. If he were wrong on this point, and the marriage never had been consummated while the husband used a sheath, then, on the first occasion when he practised *coitus interruptus*—assuming that on that occasion there was full penetration—the marriage was consummated. The petition failed. (*Cur. adv. vult.*)

The petitioner appealed.

DU PARCQ, L.J., reading the judgment of the court, said that the Matrimonial Causes Act, 1937, contained no definition of the word "consummate," and Parliament no doubt intended it to be understood in the sense in which it had hitherto been employed by judges in dealing with matrimonial causes. Before the Act of 1937 the question whether a marriage had been consummated usually arose in connection with the question of capacity to consummate. In the case of a husband who was impotent the marriage to which he was a party was voidable at the wife's instance. That necessarily followed from the generally recognised truth that one of the chief ends of marriage was the procreation of children. That truth was insisted on by all writers of authority. In their (their lordships) opinion, sexual intercourse could not be said to be complete when a husband deliberately discontinued it before it reached its natural termination, or when he artificially prevented that natural termination. To hold otherwise would be to affirm that a marriage was consummated by an act so performed that one of the principal ends, if not the principal end, of marriage was intentionally frustrated. Further, if Pilcher, J., were right, a wife who was willing to consummate the marriage in the fullest sense, but refused to permit intercourse in a manner which deprived her of the opportunity of bearing children, would be subject to an obvious and intolerable injustice; for she would have no answer to a petition by the husband founded on an allegation that she had wilfully refused to consummate the marriage. That reasoning was unsound, and if a husband were bold enough to pray for the annulment of his marriage on such a ground, the answer would be that it was he, and not his wife, on whom the blame of failing to consummate the marriage must rest. If the petitioner had never made any objection to the measures which her husband adopted, or requested him to have normal relations with her, she would certainly not be entitled to the relief which she claimed. It might be that relief might properly be refused to a wife who over a long period consented to such imperfect intercourse as was here proved, and only objected to it at a later date without being able to adduce any excuse or justification for her earlier consent. Each case must be dealt with on its own facts, in the light of established principle. In the present case they were satisfied (as they thought that Pilcher, J., had been) that the petitioner had consented to the practice of which she ultimately complained for reasons which sufficiently explained her consent, and for a limited period only, and that it would be unjust to refuse her relief on the ground that she did not refuse to submit to that imperfect intercourse from the first. It was well settled that delay in itself was not a bar to relief. The appeal succeeded.

COUNSEL: *Beyfus*, K.C., and *Busse*.

SOLICITOR: *J. Hampson Fogg.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION

***In re* Fry; Reynolds *v.* Denne**

Vaisey, J. 11th May, 1945

Will — Name clause — Absolute gift — Condition Subsequent — Repugnancy—Perpetuity—Beneficiary marries—Use of husband's name—Public policy.

Adjourned summons.

The testator, who died in 1919, by his will made in 1916 directed that his residuary estate should be held, after the death of the tenant for life, upon trust for the tenant for life's eldest son, or, failing a son, upon trust for the tenant for life's eldest daughter who should attain the age of twenty-one or marry under that age. By cl. 9 of the will it was provided that it should be a condition appurtenant to the gift of residue to a son or daughter of the tenant for life that the person so taking should take and continue to bear the testator's surname. The tenant for life had no son. Her eldest daughter, the plaintiff, was born in 1924. In 1942 she married and her husband did not wish to take the testator's surname. By this summons the plaintiff asked whether the condition was valid.

VAISEY, J., said that he thought the condition was intended to arise on the beneficiary taking possession on the death of the tenant for life. He found three reasons for holding that the clause was void. The clause was first void on the ground of repugnancy to the antecedent absolute gift, there being no gift over on the breach of the conditions (*Musgrave* v. *Brook* (1881), 26 Ch. D. 792). Secondly, the clause was void as infringing the rule against perpetuities. The plaintiff's life was not a life in being at the testator's death, and he read the attempted obligation as not admitting any intermission during the whole of the plaintiff's life. It followed that the event of discontinuance, on which it was suggested the estate would revert to the heir at law and next of kin, might well occur beyond the permissible limit of time. This was a provision deliberately designed to ensure that the plaintiff should take and use the same surname both throughout her spinsterhood and also while married. He knew of nothing to compel a married woman to use her husband's surname. None the less, the use of different surnames by a man and his wife could not fail to be productive of many embarassments and inconveniences. The wife's use of the prescribed name would make her life one long series of dilemmas and predicaments.

Whether or not the clause could be said to be actually in restraint of marriage, a provision calculated to produce consequences so undesirable by the coercive and quasi-punitive method of a defeasance ought to be regarded as inoperative on public grounds. The right form of name clause was to place the obligation not on the woman alone but on her husband as well. He would declare that the condition was wholly void and inoperative.

COUNSEL: *Christie*, K.C., and *Wilfrid Hunt*; *C. Montgomery White*; *Lindsay Jopling*.

SOLICITORS: *Finnis, Downey, Linnell & Price*; *Ellis and Fairbairn*.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

In re **Slaughter; Trustees Corporation, Ltd.** *v.* **Slaughter**

Vaisey, J. 6th June, 1945

Power—Special power to appoint life interest to wife—Appointment by deed—Subsequently marriage dissolved—Death of husband—Whether former wife entitled under appointment.

Adjourned summons.

The testator, who died in 1917, settled property on his wife for life, and after her death upon trust for his son for life, with remainder to his issue, and he gave to the son power to appoint a life interest in the trust property "to any wife who may survive him." The son married V in 1932, and in 1934 by deed irrevocably appointed a life interest in the trust property to V. The son's marriage was dissolved fn 1937, and he died the same year. By this summons the trustees of the will asked whether V was entitled to a life interest in the settled property under the deed of appointment.

VAISEY, J., said that the question was one of construction. Was V the wife of the appointor whom she survived? He thought much might be said in favour of the proposition that when any appointment was made, as it was here by deed, the status of wife if then existing made the appointee a proper object of the power, and that all she had to do to enjoy the benefit of the interest appointed was to survive the appointor. In this case the appointment might, although it was not, have been made as part of the marriage consideration. It was strange that V should be precluded from exercising her right of seeking dissolution of her marriage except at the cost of losing the interest which had been appointed to her. So far as this court was concerned the matter was governed by *Bosworthick* v. *Clegg*, 45 T.L.R. 438; *In re Williams' Settlement* [1920] 2 Ch. 361. He was bound to decide adversely to V, and he would declare that the trust income was not payable to her for life.

COUNSEL: *N. C. Armitage*: *Lindsay Jopling*: *C. Montgomery White*.

SOLICITORS: *Slaughter & May*: *Dawson & Co.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

NOTES

General Dwight Eisenhower, Admiral of the Fleet Sir Andrew B. Cunningham, and Field-Marshal The Hon. Sir Harold R. L. G. Alexander have been elected Honorary Benchers of the Honourable Society of Lincoln's Inn.

The Home Office has appointed a Consultative Committee for the London juvenile courts. Lord Munster will be chairman, and, with Mr. Harris, will represent the Home Office; Mrs. L'Estrange Malone, Mrs. Freda Corbet, Miss C. Fulford, Mr. I. J. Hayward, Mr. Eric Hall, and Mr. E. G. Savage, the London County Council; and Sir Bertrand Watson, Lady Cynthia Colville, Mrs. Drapper, Miss Younghusband, Mr. John Watson, and Mr. Henriques, the Justices of the London juvenile court panel.

COURT PAPERS

SUPREME COURT OF JUDICATURE

TRINITY SITTINGS, 1945

COURT OF APPEAL AND HIGH COURT OF JUSTICE—CHANCERY DIVISION

ROTA OF REGISTRARS IN ATTENDANCE ON

Date.	EMERGENCY ROTA.	APPEAL COURT I.	Mr. Justice UTHWATT.
Mon., July 30	Mr. Reader	Mr. Andrews	Mr. Jones
Tues., ,, 31	Hay	Jones	Reader

Date.	GROUP A. Mr. Justice COHEN. *Witness.*	Mr. Justice VAISEY. *Non-Witness.*	GROUP B. Mr. Justice EVERSHED. *Non-Witness.*	Mr. Justice ROMER. *Witness.*
Mon., July 30	Mr. Farr	Mr. Blaker	Mr. Hay	Mr. Reader
Tues., ,, 31	Blaker	Andrews	Farr	Hay

STOCK EXCHANGE PRICES OF CERTAIN TRUSTEE SECURITIES

Bank Rate (26th October, 1939) 2%

	Div. Months	Middle Price July 23 1945	Flat Interest Yield £ s. d.	‡ Approximate Yield with redemption £ s. d.
British Government Securities				
Consols 4% 1957 or after	FA	110	3 12 9	2 19 11
Consols 2½%	JAJO	83⅜	2 19 11	—
War Loan 3½% 1955–59	AO	103¼	2 18 1	2 12 2
War Loan 3½% 1952 or after	JD	104⅛	3 7 3	2 17 7
Funding 4% Loan 1960–90	MN	114	3 10 2	2 16 9
Funding 3% Loan 1959–69	AO	101	2 19 5	2 18 2
Funding 2¾% Loan 1952–57	JD	101½	2 14 2	2 10 4
Funding 2½% Loan 1956–61	AO	98⅜	2 10 7	2 11 11
Victory 4% Loan Av. life 18 years	MS	114½	3 9 10	2 19 0
Conversion 3½% Loan 1961 or after	AO	106½	3 5 9	2 19 7
National Defence Loan 3% 1954–58	JJ	102½	2 18 8	2 14 0
National War Bonds 2½% 1952–54	MS	101¼	2 9 4	2 6 3
Savings Bonds 3% 1955–65	FA	101	2 19 5	2 17 8
Savings Bonds 3% 1960–70	MS	101¼	2 19 3	2 17 11
Local Loans 3% Stock	JAJO	95¾	3 2 8	—
Bank Stock	AO	382½	3 2 9	—
Guaranteed 3% Stock (Irish Land Acts) 1939 or after	JJ	97½	3 1 6	—
Guaranteed 2¾% Stock (Irish Land Act 1903)	JJ	93	2 19 2	—
Redemption 3% 1986–96	AO	100½	2 19 10	2 19 9
Sudan 4½% 1939–73 Av. life 16 years	FA	114½	3 18 7	3 6 3
Sudan 4% 1974 Red. in part after 1950	MN	111	3 12 1	1 16 6
Tanganyika 4% Guaranteed 1951–71	FA	106	3 15 6	2 15 11
Lon. Elec. T.F. Corp. 2½% 1950–55	FA	98	2 11 0	2 14 3
Colonial Securities				
*Australia (Commonw'h) 4% 1955–70	JJ	106	3 15 6	3 5 9
Australia (Commonw'h) 3½% 1964–74	JJ	100	3 5 0	3 5 0
Australia (Commonw'h) 3% 1955–58	AO	100	3 0 0	3 0 0
†Nigeria 4% 1963	AO	114	3 10 2	2 19 8
*Queensland 3½% 1950–70	JJ	101	3 9 4	3 5 0
Southern Rhodesia 3½% 1961–66	JJ	104	3 7 4	3 3 6
Trinidad 3% 1965–70	AO	100	3 0 0	3 0 0
Corporation Stocks				
*Birmingham 3% 1947 or after	JJ	95½	3 2 10	—
*Croydon 3% 1940-60	AO	101	2 19 5	—
*Leeds 3½% 1958–62	JJ	102	3 3 9	3 0 11
*Liverpool 3% 1954–64	MN	100	3 0 0	3 0 0
Liverpool 3½% Red'mable by agreement with holders or by purchase	JAJO	105	3 6 8	—
London County 3% Con. Stock after 1920 at option of Corporation	MSJD	95⅛	3 2 10	—
*London County 3½% 1954–59	FA	106	3 6 0	2 14 10
Manchester 3% 1941 or after	FA	95	3 3 2	—
*Manchester 3% 1958–63	AO	101	2 19 5	2 18 2
Met. Water Board 3% "A" 1963–2003	AO	97½	3 1 6	3 1 6
Do. do. 3% "B" 1934–2003	MS	99	3 0 7	3 0 11
Do. do. 3% "E" 1953–73	JJ	99	3 0 7	3 1 1
Middlesex C.C. 3% 1961–66	MS	101	2 19 5	2 18 5
*Newcastle 3% Consolidated 1957	MS	101	2 19 5	2 18 0
Nottingham 3% Irredeemable	MN	95½	3 2 10	—
Sheffield Corporation 3½% 1968	JJ	107	3 5 5	3 1 6
Railway Debenture and Preference Stocks				
Gt. Western Rly. 4% Debenture	JJ	114	3 10 2	—
Gt. Western Rly. 4½% Debenture	JJ	121½	3 14 1	—
Gt. Western Rly. 5% Debenture	JJ	135½	3 13 10	—
Gt. Western Rly. 5% Rent Charge	FA	131½	3 16 1	—
Gt. Western Rly. 5% Cons. G'rteed.	MA	129½	3 17 3	—
Gt. Western Rly. 5% Preference	MA	121½	4 2 4	—

* Not available to Trustees over par.
† Not available to Trustees over 115.
‡ In the case of Stocks at a premium, the yield with redemption has been calculated at the earliest date; in the case of other Stocks, as at the latest date.

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